No. 98-38

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In The

Supreme Court of the United States

October Term, 1997

PAUL W. BERGER and ERMA R. BERGER,

Cross-Petitioners,

v.

CABLE NEWS NETWORK, INC.,
TURNER BROADCASTING SYSTEM, INC.,
ROBERT RAINEY, DONALD HOOPER
and JACK HAMANN,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITIONERS' REPLY BRIEF

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CROSS-PETITIONER'S REPLY BRIEF

The Bergers hereby reply to the Media's opposition to the Conditional Cross-Petition for Writ of Certiorari ("X/Opp"). The Media's opposition is a strained attempt to circumvent the obvious: that the Ninth Circuit was incorrect as a matter of law in disregarding this Court's constitutional restrictions on the use of wiretaps and the Seventh Circuit's interpretation of the "color of law" exemption under the Wiretap Act, in concluding that the Media were exempt from liability under § 2511(2)(c) of the Wiretap Act.[1] By focusing their attack on the Cross-Petition to disputing facts, the Media underscore the relevance of the legal issues presented and need for this Court's review.

THE CONDITIONAL CROSS-PETITION SHOULD BE GRANTED

There is no dispute that the Media hid a microphone on a Government Agent who entered the Bergers' residence which was expressly excluded from the search warrant and surreptitiously recorded the Bergers' private conversations without judicial authority and for no law enforcement purpose.[2] Unable to refute these and other facts which the Ninth Circuit found constituted "state action" for liability under *Bivens*,[3] the Media capitalize on this status by arguing that their joint conduct with the

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[1] *See* Electronic Communications Privacy Act of 1986 ("Wiretap Act"), 18 U.S.C. §§ 2510, *et seq.*

[2] The Government Agents' opposition to the Bergers' Conditional Cross-Petition ("Fed/Opp") is an attempt to re-argue the qualified immunity issue raised in their Petition for Writ of Certiorari and should be disregarded. The Government Agents are not Cross-Respondents to the Cross-Petition and the issues presented do not apply to them.

[3] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Government Agents was also under "color of law," rendering them exempt from liability under § 2511(2)(c) of the Wiretap Act. X/Opp [at page] 19-23. While the Ninth Circuit recognized that the scope of "color of law" under *Bivens* is not equivalent to that under § 2511(2)(c) of the Wiretap Act (App. 21a), it did not apply the appropriate standard articulated by the Seventh Circuit in *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993). Thus, by asserting that the Ninth Circuit was correct to exempt them from Wiretap Act liability, when the Seventh Circuit's "color of law" standard was not applied, the Media effectively concede that the basis for the Ninth Circuit's decision is in conflict with the Seventh Circuit, which serves to support the basis for this Cross-Petition.[4] The Media are also wrong to argue that journalists are exempt from liability under the 1986 amendment to Section 2511(2)(d) of the Wiretap Act. X/Opp 13-18. Nor are the Media correct in

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[4] It is unfortunate that the Media deign to cite the record out of context, attack Mr. Berger and assert that there is no evidence. *See* X/Opp 4-6, n.4-6, 9, *see also* Media Reply to Petition for Certiorari. The Ninth Circuit's opinion reflects the relevant facts and finding that the Media engaged in unlawful "joint action" with Government Agents. The undisputed evidence, for example, shows that the Media were improperly privy to confidential information about the Bergers. The Media admit being at the pre-search briefing (where Government Agents made statements about the Bergers and their investigation and disclosed information from the sealed warrants and declarations). The Media admit being present during the search involving a confidential criminal investigation. They admit using a wiretap in the Berger residence and attending numerous pre-search meetings with AUSA McLean who had a duty to keep quiet. *See* Agreement; Hamann's Producer Package Check List. The Media contradict themselves in asserting they never entered the Berger residence (X/Opp 7) while admitting that Agent Scrafford wore their microphone into the residence. X/Opp 7. The Bergers never consented to entry of the Media's microphone.

claiming that the Bergers' request for an injunction is a prior restraint.[5]

THE MEDIA ARE NOT EXEMPT FROM WIRETAP LIABILITY

Protection of the Bergers' Fourth Amendment rights is the paramount reason why this Court required that the Government Agents obtain search and seizure warrants before commencing their investigation on the Berger Ranch in March 1993. *See Katz v. United States*, 389 U.S. 347 (1967).[6] Protecting The Bergers' expectations of privacy is also why this Court has long enforced Fourth Amendment restrictions on the use of wiretaps. *See Berger v. New York*, 388 U.S. 41 (1967); *see United States v. Koyomejian*, 946 F.2d 1450, 1455 (9th Cir. 1991) (reiterating Congress's conclusion that enactment of the Wiretap Act requirements to protect individual privacy was intended to go substantially beyond the minimal constitutional constraints outlined in *Katz* and *Berger v. New York*). This case is no different.

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[5] Contrary to the Media's selective use of their tape transcript (X/Opp 6 n. 6), Agent Scrafford threatened to arrest Mr. Berger. ER 5/8:T8:3.

[6] The Media's presence and participation in the pre-search briefing and execution of the search warrant were neither justified to assist any law enforcement purpose nor expressly authorized under the search warrant. *See* 18 U.S.C. § 3105 (only persons authorized to assist the search); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g, Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994); *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982).

1. The Ninth Circuit Contravened This Court's Precedents

The Ninth Circuit's conclusory ruling that the Berger search warrant protected the Media's wiretap retroactively grants a general warrant which is contrary to this Court's precedent. *Id.* at 59 (where this Court in *Berger v. New York* outlined specificity and particularity warrant requirements and held that a New York electronic surveillance statute was unconstitutional for its expansive grant of authority like a general warrant in England). In *Gelbard v. United States*, 408 U.S. 41, 48 (1972), this Court reiterated Congress's intent to limit wiretaps to investigations for specific crimes, in order,

> [t]o assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause.

Id. at 48-49 (citation omitted).[7]

Although under *Gelbard*, the consent of one party may justify a wiretap, this Court made clear that Congress never intended for law enforcement agents to use warrantless wiretaps in the context presented in this case:

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. *No one quarrels with the proposition that the*

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[7] In *Gelbard*, this Court held that contempt charges for refusing to testify before a grand jury can be defended on the ground that a witness's wiretapped statement was unlawfully obtained under 18 U.S.C. § 2515 (restricting use in legal proceedings of communications obtained in violation of this chapter).

> *unauthorized use of these techniques by law enforcement agents should be prohibited* . . . . Only by striking at all aspects of the problem can privacy be adequately protected.

Gelbard, 408 U.S. at 50 (citation omitted) (emphasis added). The Ninth Circuit's decision conflicts with this Court's precedent and disregards Congress's intent.

2. The Ninth Circuit Contravened The Seventh Circuit

The Media disregard this Court's precedents and Congress's intent to protect the privacy rights of individuals. The Media argue that they are exempt from Wiretap Act liability under the "color of law" exemption of § 2511(2)(c) because the Ninth Circuit held that they were "state actors" under *Bivens* and protected by the authority of the search warrant. X/Opp 19-23. In the same breath, however, the Media argue that Agent Scrafford, who wore the Media's hidden microphone and facilitated the interception of the Bergers' private conversations inside the Bergers' residence, could ignore the search warrant requirement of § 2518 of the Wiretap Act because Agent Scrafford was not acting as a Government Agent when he consented to do so. X/Opp at 22-23 n.24.[8] Agent Scrafford could not "turn-off" his official capacity to serve the private needs of the Media.[9] Agent Scrafford was the Supervising Special Agent for the FWS in Montanta. Hanlon ER 3/¶3. This argument serves only to support the Cross-Petition.

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[8] The Government Agents are silent on Agent Scrafford's participation as the Media's "boom mike."

[9] In making this argument, the Media contradict the Ninth Circuit's decision that they acted "under the authority of the search warrant" and effectively acknowledge that the Ninth Circuit was incorrect. The fact that Agent Scrafford wore the wiretap into the Berger residence which was beyond the scope

The Media argue that the Ninth Circuit's opinion does not conflict with the Seventh Circuit's analysis of the "color of law" exemption under § 2511(2)(c) of the Wiretap Act in *Thomas v. Pearl* on factually distinguishable grounds. X/Opp 19-23. The issue presented, however, is legal. For a wiretap to be under "color of law" for purposes of exemption under § 2511(2)(c),

> there must be some logical and reasonable connection between the government worker's job description and eavesdropping.

Thomas, 998 F.2d at 451.[10]

Here, there was no logical and reasonable connection between Agent Scrafford's job to supervise the execution of the search warrant and the eavesdropping he facilitated inside the Berger residence. Agent Scrafford had no authority to enter the residence, let alone take the Media inside via the microphone, because the search warrant expressly excluded the Berger residence. Agent Scrafford was also required to obtain judicial authority to wiretap because, at all times, he was acting in his official capacity. 18 U.S.C. § 2518.[11] But even if Agent Scrafford applied for authority to wiretap the Bergers, the request would have properly been denied because the crime for which Mr. Berger was under investigation was *not* one of the serious crimes enumerated in 18 U.S.C. § 2516 of the Wiretap Act for which wiretaps are allowed. *See Gelbard*, 408 U.S. at 48-50. It cannot be disputed that Agent Scrafford's conduct was beyond the scope of the search warrant and not

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of the search warrant does not excuse his failure to comply with the Wiretap Act.

[10] The Government Agents acknowledge that the *Thomas* standard is correct. Fed.Opp 8 (quoting *Thomas*, 998 F.2d at 451).

[11] The Wiretap Act, "has as it dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception and wire and oral communication may be authorized." *Gelbard*, 408 U.S. at 49-50.

authorized. *See Bivens*, 403 U.S. at 394. His "consent" was thus not available to give lawfully and not relevant to support any Wiretap Act exemption.

Under the undisputed facts, the Media's joint actions with the Government Agents involving the interception and use of the Bergers' conversations was not lawfully under the authority of the search warrant. By failing to conduct the requisite analysis set forth in *Thomas*, the Ninth Circuit retroactively conferred the Media and Government Agents a general warrant to eavesdrop. *See Berger v. New York*, 388 U.S. at 59. The Ninth Circuit was wrong as a matter of law. *See Benford v. American Broadcasting Companies, Inc.*, 502 F.Supp. 1159, 1162 (D. Md. 1980) (whether ABC acted under § 2511 "color of law" when it entered a private home with congressional aids and eavesdropped was an issue of material fact supporting denial of ABC's motion to dismiss).

3. There Is No Journalist's Exemption

The Media are disingenuous to assert that the 1986 amendment to subsection (d) of § 2511(2) created some sort of blanket newsgathering exemption. X/Opp 13-18. Nothing is further from the truth. The Media erroneously rely on excerpts from a statement in the Senate Report to suggest that the Bergers' interpretation of the Wiretap Act threatens them with criminal liability and is contrary to the First Amendment. X/Opp 3 n.1. That statement, however, was an expression of concerns by the Senate that resulted in the 1986 amendment deleting "injurious" purpose from subsection (d) as a ground for liability because it was unconstitutionally vague.[12] The amendment

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[12] The statement was in the Senate Report but did not become part of the law when the House Bill was passed in lieu of the Senate Bill. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101, 100 stat. 1848, 1850 (1986), 18 U.S.C. § 2510, *et seq.*

eliminated suits for wiretaps allegedly done for "injurious" purpose as noted in the cases cited by the Media. *See Boddie v. American Broadcasting Companies, Inc.*, 881 F.2d 267 (6th Cir. 1989). However, while the amendment remedied the problem that the Media raise here, it did not create the type of privilege the Media assert. Even the court in *Boddie*, made clear that journalists were not above the law, reminding them that,

> The first amendment of course does not immunize wrongful behavior simply because it is undertaken in the name of newsgathering. Media defendants do not have a privilege to place unlawful wiretaps.

Id. at 271.[13]

The second exemption of § 2511(2)(d) was not applied by the Ninth Circuit and did not apply to exempt the Media. The First Amendment does not exempt liability where the purpose of the Media's wiretap was not only to record "sound bites" but to trespass and invade privacy to do so.[14] That the Bergers' sued the Media for intentional infliction of emotional distress was a sufficient allegation of tortious purpose. *See Boddie*, 881 F.2d at 268 & n.1 (affirming the jury's preclusion of plaintiff's claim that ABC acted with criminal or tortious purpose under § 2511(2)(d) where the plaintiff did not argue until the first time on appeal that defendants' actions constituted intentional infliction of emotional distress); *see also Benford*, 502 F.Supp. at 1162 (whether media's purpose for eavesdropping was criminal or tortious, or had a [pre-1986 amendment] injurious purpose, is an issue of material fact).

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[13] In *Boddie*, ABC, a producer and reporter were sued for surreptitiously videotaping and broadcasting the interview of a witness in a judicial corruption investigation who refused to appear on camera.

[14] As discussed, *supra*, Agent Scrafford did not have the authority to "consent" to the Media's wiretap.

Here, the Media had several unlawful purposes for the wiretap including: (1) to intercept information from the Government Agents about an investigation which was confidential, (2) to intercept the Bergers' interrogation by the Government Agents, (3) to trespass on the Bergers' private property, (4) to trespass in the Berger's private residence, (5) to invade the Bergers' privacy and (6) to gather useful "sound bites" for the Media's program. Under the facts and circumstances, the Media's purpose was not benign newsgathering. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) (eavesdropping by trespass violates the Fourth Amendment); *see Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (the First Amendment is not a license to trespass, steal, or to intrude by electronic means into the precincts of another's home or office).

ENJOINING ADJUDICATED WRONGFUL CONDUCT IS NOT A PRIOR RESTRAINT

The Media are not correct in arguing that the Bergers claim that there has been a final determination of the Media's wrongdoing. X/Opp 23-28. The question for this Court is to review denial by the courts below of the Bergers' request to enjoin the Media's future and perpetual use of the outtakes of the video and audio tapes, in whole or in part, when and not before there is a final determination of the Media's wrongdoing. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Galella v. Onassis*, 487 F.2d 986, 994-995 (2d Cir. 1973).

CONCLUSION

For the reasons set forth in this Reply and the Cross-Petition, the Bergers respectfully request that if the Media's Petition for Writ of Certiorari is granted, that this Cross-Petition be granted as well.

Respectfully submitted,

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